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The Province and Function of Law

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followed World War I, nor the accelerating tempo of the campaign against civil rights now taking place are mere whims of history or the products of momentary irrationality leading to a strengthening of the anti-democratic camp. There have always been those in America who find civil rights an impediment to power and profits. The legacy of Sacco and Vanzetti shows that they cannot be defeated merely through expressions of confidence in the rationality of either our court system or our legal quarterlies.

IRA A. KIPNIS*

The Province and Function of Law. By Julius Stone. Sydney: Maitland Publications Pty. Lit., 1946. Pp. lxiv, 918. \$15.00. U.S. and Canadian agents: The Carswell Co., Toronto.

A book entitled "The Province of Jurisprudence Determined" was published in 1832 by a certain John Austin, Professor of Jurisprudence at the newly founded University College of London. It was destined, after long initial neglect, to become one of the world's legal classics. Now, one hundred and fourteen years later, another English scholar, whom Australia has been fortunate to attract, has undertaken newly to determine "the province and function of law." The very title of the work indicates its ambitious scope, which is also indicated by the comprehensiveness of its contents as well as by the very size of this volume of roughly one thousand pages and its "bibliography of works cited" of forty-seven pages. Doctor Stone's work constitutes, indeed, a veritable encyclopedia of jurisprudential thought, especially of the last one hundred and fifty years, systematically arranged and critically illuminated. On the "schools" of jurisprudence from the Natural Law lawyers of the 17th century and their precursors to the contemporary—or should we already say, yesterday's—realists, the reader will find accurate information, concise and precise presentation of the principal tenets, acute critique, and respectful appreciation. Particularly welcome in this respect is the author's comprehensive presentation of the thought of Roscoe Pound, with whom Dr. Stone was closely associated for several years at Harvard. Previously, Pound's ideas had been distributed over a profuse number of monographic books and articles. They are now presented by Dr. Stone as a coherent and impressive whole. This entire book, indeed, appears as the performance of a task which Roscoe Pound had long been expected to carry out by himself, viz., that of tying together not only in his own amazing mind but in a book accessible to the public the vast mass of learning acquired in his long life as a student of law, jurisprudence, and human affairs, and systematically stating his own opinions on the principal problems of law and social life. Dr. Stone has had access not only to Roscoe Pound's living word but also to at least some of his private notes. Thus, in a sense, this present volume constitutes a summa of Roscoe Pound's work. Yet, Dr. Stone's *magnum opus* transcends the limits of a representation of the thought of his former teacher. The book is his and it culminates in the expression of his own well-considered and well-balanced thoughts about the feasibility of legally guaranteeing a minimum standard of living to every member of society without destroying intellectual and moral freedom.

As can be seen from its very table of contents and even more so from the footnotes, the book covers a vast field and is based upon a truly amazing store of learning. By one reviewer it has properly been said to constitute "ten volumes rolled into one."¹

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¹ Wright, Stone on Jurisprudence, 7 U. of Toronto L.J. 227, 237 (1947).

This very characterization reveals both the work's strengths and its weaknesses. While enjoying the rich fare offered by Dr. Stone, one cannot help missing a final coherence and consistency. This fault does not lie so much, however, in the execution of Dr. Stone's undertaking as in the very nature of the undertaking itself.

In its subtitle, Dr. Stone's work is called a Study in Jurisprudence, and in his general introduction Dr. Stone states that his topic is constituted by jurisprudence, which he then divides into the three main subdivisions indicated by the titles of the three parts of his book. The work thus belongs to that line of literature which was started by Austin and which continued by such authors as Holland, Pollock, and Salmond leads to such eminent recent works as those by Friedmann,² Paton,³ and Dr. Stone. The fact that this science of jurisprudence hardly exists, as such, in any non-English speaking country, might give one pause to think. Of course, every one of the problems discussed in the English books on jurisprudence has also been discussed abroad. As a matter of fact, the major contributions to the discussion of these problems have been made by non-English thinkers. But rarely have non-English scholars tried to tie together all these various problems in one peculiar science called jurisprudence.⁴ Law, as one of the most prominent phenomena of social life, has attracted the attention of specialists in many fields, such as historians, moral philosophers, economists, political scientists, psychologists, anthropologists, and sociologists. Every one of these specialists will look upon law from his own point of view, will try to correlate it with the problems and phenomena of his respective field, and will carry on that correlation with his own special methods. Needless to say, these problems and methods are different from those of the specialists of the law, both the legal practitioners and the legal scholars as they are or should be found in law schools. Needless to say, also, it is useful and stimulating to see what the representatives of other fields of learning have to say about the law. Jurisprudence, as it has developed in English speaking countries, constitutes the effort of lawyers to look upon their own field from the point of view of the other sciences, combined with a peculiar effort of legal scholars to refine their own methods in those ways which do not readily occur to the legal practitioners. The combination of these various excursions of lawyers into other fields and this peculiar extension of legal science is jurisprudence. Obviously, it is held together more by the personality of its adepts and the unity of the subject-matter of observation than by any unity of method.⁵ It is obvious also that the jurist, who has had his basic training in the legal science of lawyers, cannot readily master the methods and insights of all the other social sciences. It follows as an inevitable result that the work of even the most universally ranging jurist cannot be entirely satisfactory. The futility of controversies between

² Legal Theory (1944).

³ A Textbook of Jurisprudence (1946).

⁴ In German, "jurisprudenz" means the knowledge and science of law, including quite particularly that "lower level of science" of law which is cultivated for the sake of its practical application by lawyers; it is the stuff making up the regular curriculum of a law school. In French, "jurisprudence," and correspondingly, Italian "giurisprudenza" and Spanish "jurisprudencia," means case law as contrasted to statute law. The terms most nearly corresponding to English "jurisprudence" are German "Allgemeine Rechtslehre" and French "Théorie Generale du Droit."

⁵ It thus resembles a disquisition on, let us say, the horse, as seen from the point of view of the zoologist, the breeder, the farmer, the race-course man, the economist, the military man, the historian, the artist, the sociologist, and perhaps even the philosopher.

various "schools" of jurisprudence also becomes apparent. Efforts to write the history of a legal system or a legal institution are not antagonistic to efforts to determine the essence of justice, or to investigate the formal structure of legal propositions, or to determine the function played by the law in society in general. Happily, Dr. Stone has kept aloof from such sterile controversies. In his comprehensive system a niche has been found for every one of these endeavors. This achievement constitutes one of the great merits of his work. It has not been possible for the author, however, to master completely the methods of every one of the various sciences to which he resorts for the elucidation of the law. Indeed, who would ever aspire to such mastery? To a high degree Dr. Stone has shown himself to be at home in the social sciences in the narrower sense of the term, especially in political science and sociology; the third part of his book is thus the most satisfactory one. What satisfies least, however, is the first part, entitled "Law and Logic."

The author's use of the word "logic" is indeterminate, and clarity suffers further from his combination of two different sets of problems, viz., that of so-called analytical jurisprudence and that of the role of concepts in practical legal reasoning.

Today the most urgent problem which "jurisprudence" is expected to answer is that of determining the proper attitude of the judge toward the law. To what extent is he bound by the law, to what extent is he free from it? By long and often sad experience mankind has learned that no civilized community can endure when judicial decision is determined by individual whim and arbitrariness. Judges are supposed to be guided by the law. On the other hand, the legal order cannot provide ready-made rules for every conceivable controversy; of necessity, the law must have gaps. Furthermore, life changes and the law is not always adapted to the changes with sufficient speed. Hence, judges cannot be totally bound to the law. They must have a certain measure of freedom. But how much? The answer will have to change from place to place and from time to time. What answer shall be given here and now? Having passed through a period of remarkable stability, we are now finding ourselves in a period of rapid transition, in which judges must have a freedom greater than that which was conceded to them in the nineteenth century. Shall we therefore free them entirely from the binding force of the law? This has, indeed, been the proposal of some of the realists, only they expressed this counsel under the disguise of a postulate that judges be freed from the fetters of logic. If taken literally, that demand would mean that judges be freed from the fetters of consistent thought. However, that is hardly what is meant. But yet, the fight has been waged against the alleged fetters of the syllogism. The rules of law are expressed in general propositions. The controversies to be decided appear as concrete fact situations. The decision is found by syllogistically subsuming the minor premise of the concrete facts under the major premise of the rule. Shall this process be given up? Shall judges decide individual cases without even trying to formulate a general rule, perhaps a new one, of which the concrete case appears as an application? If so, the rule of law and the principle of equality are effectively terminated. Or shall we only say that, where the law is silent, the judge may formulate a new rule, and where it is obsolete, may modify the old, always insisting, however, that he express his major premise as a rule capable of general application? If we require this, how far shall the freedom of modifying or newly creating general rules go? -

These questions are burning at this time and for guidance the lawyers are turning to the jurists. In Dr. Stone's book the problem is touched upon in numerous places,

but nowhere are the questions formulated as they have just been stated. Indeed, if the problem is seen as one concerning the relation between law and logic it can neither be formulated nor answered with clarity, since there can be no question as to that relation. As long as lawyers do not wish to incur internal inconsistencies of thought, they have to abide by logic. In speaking of internal consistency I do not mean that all the innumerable rules of law must necessarily be consistent with each other in the sense that they would all be expressive of one and the same policy, or that they would constitute conclusions derived in the process of logical implication from one single over-all principle. Such political consistency has been attained only in the dream systems of natural law writers or, perhaps, approximated in totalitarian dictatorships. It is unattainable in the complex democracies of the present. In places, Dr. Stone might be understood as suggesting that the unattainability of such political consistency ought to be regarded as an argument against the use of logic in the thinking of lawyers. But in justice to him it should be stated that he does not, or, at least, does not seem to, join with the radical realists' abjuration of logic. He is too cautious an Englishman to take such a radical position. But, on the other hand, he does not make it quite clear what in particular he is aiming at with his catalogue of faulty uses of logic in actual Anglo-American legal thinking. The sections making up this catalogue are among the most interesting parts of the book. They would seem to constitute an impressive invitation to the improvement of lawyers' thought, especially through the better formulation of the rules from which decisions are to be derived. Similar examples were at one time collected for German law by Heck and his colleagues and followers; they were used, however, by this so-called school of jurisprudence of interests for definite proposals as to the reformulation of the rules of law and the concepts used therein so as to replace ambiguous, meaningless, or empty concepts or concepts of a merely classificatory nature by concepts adequately describing the real interests at stake.⁶ Unfortunately, when Dr. Stone wrote his book, the works of Heck and his school had not yet been translated into English. They might well have been used for demonstrating that the jurisprudence of concepts is an evil only when wrong concepts are used. But thinking without concepts is as unthinkable as talking without words; and equally unthinkable is rational thinking without logic.

In that part of Dr. Stone's book which deals with the relation between law and logic the discussion of the problems relating to the judicial process is combined with that of the so-called analytical jurisprudence. Apparently, the connection is seen in the fact that the analysis by the analytical jurists of the formal structure of the legal order, the rules of law, and the concepts used therein is regarded as a prototype of logical thinking. To some extent the connection may appear plausible as far as the Austinians are concerned, but it does not seem to do justice to Kelsen, although his system of thought itself is restated with remarkable clarity and objectivity. Dr. Stone emphasizes the great merit which Kelsen has achieved through his exposition of the specious nature of that way of reasoning which tries to solve problems of policy by the allegation of some spurious logical necessity. It may be doubted, on the other hand, whether the reader obtains a full impression of the fact that Kelsen has addressed himself to problems of a thoroughly practical character, especially the problem of furnishing the judge with clear tests for determining whether a proposition purporting to be a

⁶ Twentieth Century Legal Philosophy Series. Vol. II. The Jurisprudence of Interests (1948).

rule of law really is a rule of law, or the problem of clarifying the scope of the law-making power of judges, administrative agencies, or private parties.

The second part of Doctor Stone's book, entitled "Law and Justice," is devoted to the critical presentation of the schools of Natural Law, Metaphysical Individualism (Kant), Individualist Utilitarianism (Bentham), Social Utilitarianism (Jhering),⁷ Social Idealism (Stammler), Neo-Hegelian Civilization Theory of Justice (Kohler), Social Solidarism (Duguit), and Pragmatism (Pound). The presentation is lucid and the criticisms are well taken. None of the various schools is credited with having found *the* answer to the quest for justice, but they all are recognized as having met peculiar needs of their respective times, having brought into focus the available alternatives, and, through their very manifoldedness, having helped to create an attitude of diffidence as to individual choices "which will permit manifest errors to be more quickly detected and remedied as experience discloses them." The author's own attitude is thus revealed as one of sceptical though optimistic pragmatism which finds articulate expression in the final chapter of his book.

The schools of thought discussed by Doctor Stone are those which one would generally expect to find discussed in a book on "legal philosophy." They are all centered not so much around any peculiar problem of the law as around the general problem of justice. It is generally postulated of the law that it be just. But what is the just law? It is that law which is apt to be helpful in bringing about the just social order, "the good society." Discussions on the law and justice have usually been concerned not so much with the technical problem of law in detail as with the ethical problem of how the social order should be constituted so as to deserve to be called just. This problem of the good society has occupied the world's philosophers for many centuries. It has not been a peculiar domain of the lawyers, but what is being traditionally called legal philosophy is the thought of philosophers or amateur philosophers who were either simultaneously, or primarily, lawyers, or who, like Kant, gave to some part of their philosophical systems the title "philosophy of law." There are traditionally excluded, however, from treatises on "legal" philosophy those "mere" philosophers who, not being lawyers, have concerned themselves with the problem of the good society as such. Also generally excluded from a discussion which by its nature transcends national boundaries are those "legal philosophers" whose works have not yet been translated into the language of the particular author. Thus one does not yet find in Doctor Stone's book the ideas of, for instance, Dabin of Belgium, Lask, M. E. Mayer, and Radbruch of Germany, or Recaséns Siches or Carlos Cossio of Latin-America, not to speak of such representatives of unorthodox thought as Pashukanis or Vizhinsky of the U.S.S.R., Carl Schmitt of National-Socialist Germany, or Rocco of Fascist Italy. Their inclusion might, perhaps, have revealed that the "liberal" thinkers who are represented in the book have in common a greater measure of agreement than becomes apparent without a contrasting foil.

The third part, which is entitled "Law and Society," and which covers more than half of the book, is concerned with that field which the author alternately calls "Sociology of Law" and "Sociological Jurisprudence." It is questionable whether these two terms should not better have been differentiated from one another. Sociology of law is the heading more generally used for the theoretical inquiry into the function of law in

⁷ This is the correct spelling of the name and *not* "Thering," as it is consistently misspelled in the book.

society in general; sociological jurisprudence, on the other hand, is the practical method of utilizing sociological data in the judicial process. In that sense, sociological jurisprudence would belong together with those problems of the judicial process which the author has treated in the part of his work on logic. Indeed, the third part is concerned primarily with "Sociology of Law," i.e., with the function of the law as a means of social control. Such a discussion would seem to require at the outset a clear distinction of the law from other means of social control such as etiquette, ethics, or religion. Doctor Stone consciously refrains, however, from attempting any such differentiating definition of the term "law." He states that it "seems preferable at this date to cease hankering after some one simple criterion of 'lawness'."⁸ If, as it must be conceded, it would not have been easy to find any one simple criterion, it might still have been possible to state at least the tests by which law, the subject-matter of his work, is understood by the author himself. Less self-restraint in this respect might well have changed the contents of the main part of his book which now, although not consistently, appears more as a general theory of society written by a legal scholar than as a determination of the relations between legal and other techniques of social control. What we find in this part, as it stands, are presentations of the thought of the "historical" schools of law of both Germany (Savigny) and England (Maine) which, as Doctor Stone's presentations of other schools of thought, are lucid and well-balanced. We then find the series of chapters already mentioned in which, elaborating upon bases laid by Roscoe Pound, Doctor Stone analyzes those interests, both individual and social, which present Anglo-American law is meant to protect. These chapters belong more to sociological jurisprudence as a guide for English and American judges than to sociology of law as a general theoretical science. Yet, since a comprehensive discussion of this kind can rarely be found upon the practitioners' level, it may be justified to include it in a book dwelling on the higher level of jurisprudence. The elaborate catalogue of interests is, no doubt, stimulating for thought and valuable in judicial practice but we must ask whether it is enough for the judge to know what interests are being protected by the legal order, and whether he does not also have to know how these various interests are evaluated by the legal order when they come, as they continuously do, in conflict with one another. The essential task of the law is that of deciding between conflicting interests, and every single rule of law constitutes a decision, frequently having compromise character, between conflicting type interests. When confronted with a "new" case the judge has to utilize the official value judgments expressed in the existing rules of law, as well as those inofficial ones which live inarticulated in society as contents of its ethical convictions. The "jurisprudence of interests," to which reference has already been made,⁹ gives, I believe, more helpful assistance in this judicial task than a mere listing of those interests which have, in one way or another, found protection in our law.

In spite of the author's reluctance to bind himself to one single definition of law, and his consequential tendency to discuss the general problem of social control, he has found himself compelled in the last subdivision of his third part, by and large to use the word law in the sense of state-enforced rules of behavior. Otherwise, there would have been impossible any discussion of the various theories denying the law's existence or justification, or of the significance for law of socio-ethical pressures ("social use and wont") and of power. Yet, the reluctance to use this definition more consistently has

⁸ P. 717.

⁹ P. 757 *supra*.

debarred the author from an inquiry into certain problems which one might expect to find in a treatise on sociology of law. One of these is the effectiveness of governmental regulation, in general and in comparison with other techniques of social control. The problem seems to be touched upon in several places, but where it seems to be treated, closer analysis reveals that we are faced with another problem of a different character. In his extensive writings, especially his *Sociology of Law*, Eugen Ehrlich has at length dwelt upon the phenomenon that in numerous social relations, e.g., in marriage, a sale, a contractual relation, a testamentary disposition, or a business partnership, numerous details are regulated by the parties themselves in some manner different from that set out in the rules of law as they appear in a code, a statute, or judicial case law. From this observation Ehrlich concluded that there not only existed, but was bound to exist, a discrepancy between the law of the books and the law in action. This conclusion was not justified, however, since in almost all of the cases observed by Ehrlich the rules of the books are rules which by their very own terms are not to be applied unless the parties to the transaction have failed to set out their own terms. The failure to recognize this fact was astonishing in a man like Ehrlich, who, as a professor of Roman law and Civil law in Australia, was, of course, thoroughly acquainted with the distinction between strict law, i.e., law purporting to apply independent of any intention of private parties, and dispositive law, i.e., law applicable only in the case of the party or parties concerned having failed to set out their own terms.¹⁰ Dr. Stone cannot be blamed when he, in whose legal system the distinction, although existing, has never been clearly formulated, took over the error of Ehrlich. The problem of the effectiveness of the law can properly be raised only with respect to the strict law and it is found in its most puzzling shape in those situations in which not only a considerable proportion, perhaps even the majority, of the public fails to obey a law but where it is also winked at by the very law enforcement agencies. This problem, on which some acute observations have been made by Thurman Arnold¹¹ as well as by law review commentators on the law of divorce, is not discussed by Doctor Stone. Then, there is the set of problems which arise when in a society the law has become the domain of a group of specialists who, following their own traditions and techniques, in the course of time bring about a discrepancy between the rules of law and the practices and ethical convictions of the people at large. Some aspects of this problem are dealt with in connection with the famous lag which so many social scientists claim as inevitably existing between the law and the mores. Whether this lag is really inherent in the law is questionable. In colonial areas and in enlightened despoties the law has often run ahead of the mores, as it has occasionally done in democracies when some progressive minority has succeeded, through skillful manoeuvring or otherwise, to obtain legislative adoption of a proposal for which the majority mores have not been ready. The lag is not the only expression, however, of the more extensive phenomenon of discrepancy between a law manipulated by legal specialists and the mores. It arises, for instance, whenever a foreign legal system is "received" wholesale, as Roman law was received in fifteenth and sixteenth century Germany, or as Western codes have been adopted in our times in Japan, China, Turkey, and other Eastern countries. The phenomenon occurs also in our own society

¹⁰ As a matter of fact, one of Ehrlich's own early writings was concerned with the problem. It is entitled "Das Zwingende und nichtlungen zum Privatrecht und Civiprozess" (1899).

¹¹ The Symbols of Government, esp. 148 et seq. (1935), and Folklore of Capitalism, *passim* (1937).

when the lawyers, carried along by their concern about technicalities or other motives, render the law so intricate that it can no longer be understood by the laymen whose conduct it is supposed to regulate. These problems, which were clearly recognized and formulated as early as in 1843 by Georg von Beseler,²² are serious and ought to be discussed in the sociology of law.

Finally, there is one problem which may well be called to be of central importance—that of the peace and order function of the law. What was the role played by the law in the establishment of peace and order in primitive communities and in the elimination of the feud and internal warfare in those nations which were to mature into the states of our present world? Which role can the law be expected to play in the “outlawry” of war and in the establishing of a more peaceful world order? This problem of international law, which is so vital in our own days, is hardly touched upon in this book on the province and function of law.

Much space has been given in this long review to criticism. This very fact should indicate that we have been dealing with an important book. Doctor Stone has given us the most comprehensive modern treatise on jurisprudence. The width of his knowledge is admirable, his judgment of other men's theories is eminently fair, the new insights developed by him are numerous and helpful, his style is facile, and the reader will be delighted by the skillful expression of criticism in those respectful phrases in which English lawyers are wont to argue against each other. That the work does not completely satisfy is due primarily to its very task itself. This task has been simultaneously too narrow and too broad. It has been too narrow in that the author's own observations are almost exclusively derived from the common law of England and its derivatives. If “jurisprudence” wishes to be a general theory of law, it has to take its materials from the laws of all times and climes. The task has been too broad, however, in that it has not been limited to problems peculiar to the technique of social control through governmental compulsion, but has also tried to embrace the immense field of social control in general as well as the eternal problem of the good society. Jurisprudence is too vast a province to be completely explored by one man. It will have to be divided up into several provinces, every one of which at this time requires a vast amount of exploratory work. As the results become available, lawyers will have to utilize them for the improvement of their art and the deepening of their understanding. Doctor Stone's far flung exploration can constitute a stock-taking, revealing what we already know and in what respects further work needs to be done by the specialists of the various social sciences.

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